

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

IN THE MATTER OF	§	
	§	
	§	CG Docket No. 10-51
STRUCTURE AND	§	
PRACTICES OF THE VIDEO RELAY	§	CG Docket No. 03-123
SERVICE PROGRAM	§	

**COMMENTS OF
HANCOCK, JAHN, LEE & PUCKETT, LLC d/b/a
COMMUNICATION AXESS ABILITY GROUP'S (CAAG)**

Hancock, Jahn, Lee & Puckett, LLC d/b/a Communication Axess Ability Group (“CAAG”) is a Video Relay Service (“VRS”) provider whose application for certification was conditionally granted on November 15, 2011. CAAG appreciates the opportunity to provide comments in connection with the Commission’s further review of “options and proposals to ensure that VRS continues to offer functional equivalence to all eligible users and is as immune as possible from any additional waste, fraud and abuse.”¹

Using the Cost of the Neutral Video Communication Service Provider Contract as a Benchmark for Fully Integrated Service

The Commission proposes that the contract price paid to the neutral video communication service provider for the disaggregated video communication service component of VRS serve as a benchmark for setting appropriate compensation applicable to any VRS provider that chooses to continue offering a fully integrated service. CAAG suggests that it may

¹ *In the Matter of Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket Nos. 03-123 and 10-51, ¶ 1 (June 10, 2013).

be premature to decide whether the contract price can serve as a benchmark until the basis for compensating the neutral video communication service provider is determined. Should the contract rate be determined other than on a per-minute use basis, for example, it is difficult to know now how that rate might serve as a benchmark.

If the contract for the disaggregated service component of VRS is awarded on a per-minute compensation basis, other issues might also be taken into account in deciding whether the contract rate is an appropriate benchmark for integrated providers. To best evaluate the suitability of the contract rate, CAAG suggests that candidates for the neutral video communication service provider role be asked to state separately the estimated cost components used to generate the proposed contract rate. This may permit the Commission to determine whether any of those components are “avoidable costs” of an integrated provider. The expense of dedicated resources supporting a neutral video communication service provider’s interaction with the VRS CA service providers is an example of a cost that would not be incurred by an integrated provider. Other categories of costs might be avoidable by the integrated provider as well.

Auctions and Using Auctions to Establish a Per Minute Rate for CA Services

CAAG will address what it perceives to be two separate, but related issues: (i) whether it makes sense to open to competitive bidding the servicing of traffic to some set or sub-set of frequently-called entities, including private sector service providers and government agencies, and (ii) if such an auction is conducted, should the results of the auction be used to set a per-minute reimbursement rate for all VRS CA services.

Many opportunities to provide community-based interpreting services are open to competitive bidding. As such, CAAG is no stranger to competing, and competing successfully,

to provide interpreting services for organizations and public and private sector institutions. Also, the proposal to auction the opportunity to handle certain high volume, streams of traffic is an attractive concept from the standpoint of creating the potential to have quality-focused providers of CA Services handling a larger percentage of traffic.

This shift, if it occurred, might elevate the overall quality of service available, which would be a positive development given the quantum of patience and level of communication skills sometimes required to accomplish a desired goal or reach an acceptable resolution when conversing with the service providers and agencies identified. The reality is that the subject matter of the conversations with these frequently-called entities can be more complex (and sometimes more contentious) than an everyday social telephone call. Those complications add to the importance of having highly skilled CAs involved. Given the added challenges, positioning CAs with the highest skill level to facilitate those communications would represent an opportunity for improvement in the delivery of services.

CAAG's concern with the proposed auction, however, is that the "lowest price" bidder approach may achieve the opposite result, with the award of traffic that deaf individuals may consider personally critical going to a least-cost provider, whose drive to further reduce costs will result in further deterioration of service quality. The reality is that the Commission is constrained in its ability to implement some of what might otherwise be progressive and creative approaches to effecting cost reductions and setting "market" rates by the current structure of the industry. Today, Sorensen controls an overwhelming percentage of the market. In industry sectors with market share percentages skewed in the direction of a single provider, the very real danger exists that the dominant player will bid at or near a predatory level, being willing to absorb short-term losses in order to enjoy long-range freedom from competition. The pattern of

dominant players leading with a loss in order to capture even greater market share, and drive out competitors, is a practice targeted for its anticompetitive impacts. The ultimate outcome, and one that is particularly brutal on consumers, is that prices ultimately rise, and quality eventually suffers as customers enjoy fewer and fewer choices.²

This is where coupling the auction proposal with the use of the auction outcome to determine a “market” rate is particularly problematic. As appealing as the concept of a market rate might be, only a regulated rate may work now, and for the foreseeable future, because of the market structure and because delivering quality VRS involves more than lowering the cost. If all the auction is designed to accomplish is identification of the lowest bid, and that lowest bid is then applied to compensation across all VRS traffic, the danger of a dominant market participant bidding below cost to drive out competitors is further exacerbated.

Significantly, the auction process, as described, fails to take into account any qualitative differences in the services the bid participants provide. Contrasted with other request for proposal contests in which CAAG has engaged, the auction process proposed selects the bidder willing to serve with the lowest offered price-per-minute. An attempt to pre-qualify participating bidders, assuming all are certified VRS providers, on the basis of which providers have the best-qualified CAs might be optimal, but it may also be impractical. The risk of not doing so, however, is enormous. Failing to take into account the service quality of the bidders, all of whom are technically capable of meeting the demand with current or attainable resources, would mean the least-cost provider wins and consumers of the service lose.

The impact of involuntarily pairing consumers with a particular service provider for communications those individuals may consider particularly critical (e.g. phone service,

² See generally Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

government benefits, banking) should not be overlooked or taken lightly. Today, those consumers have a choice of providers. That choice will go away under the auction process as proposed for calls that represent a substantial percentage of today's VRS minutes of use. Are the benefits sought, even if attainable, worth the trade off? The purposes of using an auction process apparently include development of a "market" rate, yet a reliable, competitive rate capable of sustaining healthy competition is not likely to emerge from the auction process.

As compared with other competitive processes that result in the award of interpreting service business, this auction process would result in the replacement of the provider a consumer already has chosen with another provider. If that kind of sacrifice is necessary to reduce the overall costs of VRS, and if the Commission believes an auction is the best means to receive input into what compensation rate should apply to VRS traffic, CAAG proposes that the Commission proceed first with a very limited trial.

CAAG advances two proposals relating to qualifying participants for any such pilot. First, to address the issue of how best to incorporate quality of service considerations into the process, CAAG proposes that the pilot be limited to VRS providers who employ only certified CAs. Second, in response to the question posed as to whether the process should be open to entities not certified as VRS providers, CAAG strongly believes it would represent a reversal of the progress the Commission has achieved in the various reforms of VRS to extend this new opportunity to entities that are not certified providers.

Hearing Individuals' Access to Service for Point-to-Point Calls

CAAG would welcome allowing hearing individuals to obtain ten-digit numbers to make point-to-point calls with VRS users. This would represent an important improvement in the ability of deaf and hearing individuals to communicate when an interpreting service is not

necessary. Because the hearing individual already has invested in technology to support access to telecommunications services, CAAG would support providing this additional access at no cost or a nominal fee. When viewed as enabling the deaf and hard of hearing to enjoy equal access to means of communication available to others, it makes sound policy sense for the VRS program to absorb most, if not all, of the additional costs to implement this enhancement. Because this development would reduce the number of compensable minutes, it is not clear that the net costs would increase. CAAG, however, has not performed a study to quantify any incremental cost increase.

TRS Fund Advisory Council

CAAG supports the proposal to broaden the focus of the TRS Fund Advisory Council so that the Council may contribute more effectively to the shaping of the VRS landscape.

Disaggregation of Emergency Calls to 911

CAAG supports dedicating VRS emergency call handling obligations to a single VRS contractor, whether through a competitive bidding or other process, for one compelling reason. The frequency of handling 911 calls is so low, based on CAAG's current experience as a VRS provider and its prior experience as a subcontractor, that concentrating this activity in a single, specialized provider will increase the probability that the calls will be handled by CAs with greater familiarity. Given the critical nature of these infrequent calls, CAAG fully supports allowing this important function to be carried out by a single provider through a specialized team of CAs with experience handling these infrequent, but challenging communications.

Speed of Answer

CAAG does not advocate a further reduction in the speed of answer requirement to 85 percent of the time within 10 seconds. It can take longer than 10 seconds today for a cell phone

user to be connected to the called party's voice mail. Whatever incremental improvement might be introduced by a reduction to a 10-second metric would not justify the added costs of hiring the additional CAs needed to meet this more stringent standard.

Regarding the proposed methods to calculate speed of answer and to verify compliance with the newly-modified VRS speed of answer requirements, CAAG supports including calls unanswered in [60][30] seconds or less and calls answered in [60][30] seconds or less in the numerator and all calls (unanswered and answered) in the denominator, as represented in the formula captured in paragraph 261. It should also be clear that both test and internal calls are excluded entirely from the formula.

Restructuring Section 64.604

Restructuring section 64.604 of the Commission's rules is an excellent concept. In particular, CAAG supports the proposal to segregate the rules by category (e.g., operational standards, emergency calling, registration, etc.) with each service addressed in a subsection of the rule for a particular category. CAAG also would support, and would prefer, a reorganization that segregates the rules by service (e.g., VRS) with rules by category (e.g., operational standards, emergency calling, registration, etc.) addressed in subsections of the rules specific to each particular service. Either approach to a reorganization should clearly identify which rules are considered minimum standards.

Access to Video Mail

Technical standards to support interoperability will be necessary to fully deploy the ability of all VRS users to leave video mail messages, regardless of the users' service provider and without the intervention of an interpreter. CAAG does not believe all technologies used

today to support delivery of video mail messages in calls involving an interpreter will support delivery of video mail messages in point-to-point communications.

The timing of that development and its implementation may depend on how quickly interoperability standards could be agreed upon so that this capability will be truly indifferent to the identity of the particular VRS provider.

Non-Competition Agreements

Sorenson's argument that non-competes encourage investment in training of VRS CAs is unpersuasive. In fact, the opposite effect is more likely. An entity like Sorenson, with its dominant position in the marketplace, has less incentive to invest in quality, continuing education and training if it has confidence that its CAs are not a likely flight risk. The mere existence of a non-competition agreement, regardless of its ultimate enforceability, provides the basis for that perverse confidence.

Non-competes are a bad idea for all the reasons traditionally cited by authorities voiding or narrowing the application of agreements restricting the ability to recruit or hire employees.³ From the perspective of a CA, leaving Sorenson to work as a VRS CA for another provider means taking a risk that Sorenson will be successful in enforcing the restrictive covenant's terms and the professional will be unemployable. Or, the departing VRS CA might not be willing to incur the litigation costs necessary to resist Sorenson's enforcement efforts, and so the individual sits on the sidelines, waiting a year (or whatever the length of the term) for the restriction to expire. No good policy supports either scenario and in both cases, the profession and those deaf individuals dependent on VRS are needlessly deprived of the talents of a trained interpreter. Importantly, a non-compete does not need to be legally enforceable to be effective because the

³ Cf. *United States v. Adobe Systems, Inc.*; *Apple Inc.*; *Google Inc.*; *Intel Corp*; *Intuit, Inc.*; and *Pixar*, Case No. 1:10-cv-01629, Competitive Impact Statement (Sept. 24, 2010) (describing the pernicious effect of defendants' agreements not to cold call one another's employees).

majority of individuals will not have the resources to resist even an unsuccessful enforcement effort. Restrictions on the available pool of VRS interpreters also raise a provider's cost of recruiting and training interpreters, diminishing the chances of the industry becoming competitive.

An implement to facilitate the maintenance of a captive employee base is particularly obnoxious where, as here, none of the justifications typically cited to support non-competes is present. First, regardless of what further training providers offer, interpreters come to a provider with some level of training or experience or, in CAAG's case, as certified professionals. Therefore, protecting the provider's investment in entry-level training is largely a non-issue because virtually all CAs come with a level of interpreting skills (regardless of whether the provider hires only certified CAs). Second, CAs are not typically exposed to the type of confidential technical, business strategy or cost structure information that would constitute a protectable trade secret. Sorenson does not even posit that as a possible explanation for locking in its employees. Third, unlike with certain other vocations, CAs are not commissioned employees in danger of moving with a Rolodex in hand or a contact list on a pen drive, offering portable business to a competing VRS provider. In short, even the imperfect grounds frequently cited to support enforcement of narrowly constructed restrictive covenants are not present here.

Section 225(d)(1)(A) of the Telecommunications Act of 1934, as Amended (the "Act"), which directs the Commission to "establish functional requirements, guidelines, and operations procedures for telecommunications relay services," affords sufficient authority to restrict the use of restrictive covenants.⁴ This statutory authority permits the Commission to prohibit practices that limit the pool of trained CAs available to support delivery of quality VRS. Likewise, the

⁴ 47 U.S.C. § 225(d)(1)(A).

authority allows the Commission to police practices that negatively impact the quality of VRS by erecting barriers to entry by competitive VRS providers. Non-competition agreements, which limit the available pool of talent a new entrant might recruit from, would erect a barrier to entry because quality CAs are a provider's most important asset.

Section 225(b)(1) of the Act also provides authority through its mandate that the Commission "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States." In order to make VRS available "in the most efficient manner," harmful restrictions limiting the availability of quality interpreters must be eliminated. Having trained VRS interpreters sitting on the bench waiting for a non-competition agreement to expire does not promote efficiency.

CAs Working from Home During Overnight Hours

CSDVRS's petition for a partial waiver of the prohibition against CAs working from home makes perfect sense from the standpoint of ensuring the safety of CAs during overnight hours. The reality is that providers may frequently address the issue by over-staffing in the overnight hours, when the incidence of calls is (not surprisingly) low, in order not to have isolated CAs on duty in an otherwise empty building. As tempting as the partial waiver proposition might be, CAAG also understands many of the factors that led the Commission to end the practice of permitting CAs to work from home, including concern that the home environment might negatively impact the quality of service.

With disaggregation and the movement toward standalone VRS CA service providers and the neutral video communication service provider, another very appealing option may be available to serve the multiple interests at stake. CAAG proposes that VRS providers be offered


the option to pool their overnight hour resources so that providers could rotate providing coverage during those low volume hours. With a neutral video communication service provider handling call routing, this alternative may not be difficult to implement. The attraction of this option is that customers would continue to be assured of 24/7 access, and VRS CA service providers could lower costs incurred, including those costs incurred to create excess capacity with the sole, albeit critical, objective of ensuring CA safety. This proposal would not signal a return to the era of subcontracting because the pooling option would be available only among certified VRS providers.

Conclusion

CAAG appreciates the opportunity to provide these comments and looks forward to reviewing the submissions of other commenters in this proceeding.

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